Supreme Court, U.S.
FILED
JUN 6 2002
CLERK

NO. 01-1594

IN THE

SUPREME COURT OF THE UNITED STATES

ALCAN ALUMINUM CORPORATION

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED

et al.

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Lawrence A. Salibra, II
Counsel of Record
Elisa P. Pizzino
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights, Ohio 44124-4185
(440) 423-6918

Attorneys for Petitioner
Alcan Aluminum Corporation

10P95

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. LLOYDS DOES NOT DISPUTE THAT BY DENYING ALCAN POST JUDGMENT INTEREST ON THE AMOUNTS THAT WERE UNDISPUTED ALCAN HAS BEEN ECONOMICALLY PENALIZED FOR APPEALING CITING EXCLUSIVELY TO BRONSON	1
II. LLOYDS' ARGUMENT THAT RULE 39(E) PERMITS THE DISTRICT COURT TO TAX THE COST OF THEIR BOND TO ALCAN SIMPLY DEMONSTRATES THAT EVEN LLOYD'S DOES NOT BELIEVE THAT THE DISTRICT COURT AND THE NINTH CIRCUIT OFFERED PLAUSIBLE JUSTIFICATION FOR WHAT THE DISTRICT COURT AND THE NINTH CIRCUIT DID	3
III. LLOYDS' ATTEMPT TO CHARACTERIZE THE ISSUE OF THE EFFECTIVE DATE OF JUDGMENT AS SIMPLY A MATER OF IMPROPERLY CALCULATING THE INTEREST FROM THE CORRECT DATE IS A PATENT MISREPRESENTATION OF THE FACTS. AS IT ADMITS THE JUDGMENT WAS AMENDED FOR THE CONVENIENCE OF ANOTHER INSURER TO CLARIFY A MATTER SOLELY WITH RESPECT TO IT, NEITHER THE RIGHTS OF LLOYD'S OR ALCAN WERE MODIFIED BY THE CHANGE AND EACH OF THE OTHER INSURERS PAID INTEREST CALCULATED FROM THE ORIGINAL DATE. THE REAL ISSUE IS WHETHER COURTS	

CAN MODIFY LEGAL OBLIGATIONS FOR THEIR FORMER CLIENTS WHO HAVE CHOSEN NOT TO APPEAL THE ISSUE. 3

IV. LLOYD'S ATTEMPT TO CHARACTERIZE THE NINTH CIRCUIT'S DECISION CONCERNING THE DAY AFTER THANKSGIVING AS A TRIVIAL FACTUAL DISPUTE IS DISINGENIOUS BECAUSE IT IGNORED THE FACT THAT THE ISSUE WOULD HAVE WIDESPREAD IMPORTANCE IN CALIFORNIA AND PERHAPS OTHER STATES WHERE THE DAY HAS ALL THE PRACTICIAL ATTRIBUTES OF A STATE HOLIDAY. 5

V. LLOYDS' OPPOSITION DOES NOTHING TO DISPUTE THE FACT THAT THE ENTIRE COURSE OF CONDUCT BY THE COURTS EVIDENCES A SYSTEMATIC EFFORT TO FRUSTRATE THE APPLICATION OF THE RULE OF LAW. 6

TABLE OF AUTHORITIES

Cases:

Bronson & Soutter v. La Crosse & Milwaukee R.R., 68 U.S. 405 (1863) 1, 2, 6

Enserch Corp. v. Shand Morahand & Co, 918 F.2d 462 (5th Cir. 1990). 2

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 49 U.S. 827 (1990) 1

LSO Ltd., v. Strohs, 205 F.3d 1146 (9th Cir. 2000) 3

Statutes

FED. R. APP. P. §39 (e) 3

ARGUMENT

Lloyd's opposition is notable in two distinct respects. First, it carefully avoided addressing the issue of the use of unpublished-nonprecedential opinions and the abuses illustrated by that practice in this case. It did so because it had no way of effectively demonstrating that this practice has not lead to demonstrable judicial abuse. Second, and the linchpin of the second element of its response, was to claim that the *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. 405 (1863) case rendered by this Court during the Civil War was a complete and adequate explanation for the entire series of events in this case and the obvious refusal of the Ninth Circuit to apply California law.

I. LLOYD'S DOES NOT DISPUTE THAT BY DENYING ALCAN POST JUDGMENT INTEREST ON THE AMOUNTS THAT WERE UNDISPUTED ALCAN HAS BEEN ECONOMICALLY PENALIZED FOR APPEALING CITING EXCLUSIVELY TO *BRONSON*.

Whatever one might urge that *Bronson* stands for, it seems beyond dispute that there is no holding in that case that post-judgment interest, a creature of the Federal Rules adopted many decades later, stops running. Instead, Lloyd's simply makes the illogical leap that a stay of execution of the judgment is the economic equivalent of the elimination of post-judgment interest.

It makes no effort to reconcile this bizarre reasoning with the clear statement by this Court in *Kaiser Aluminum & Chem. Corp. v. Bonjorno, 49 U.S. 827, 835-836 (1990)*, that the purpose of post-judgment interest is to simply protect the value of the judgment during the delay in payment due to the loss of the time value of money. Nor does Lloyd's, offer any logic which supports its argument that simply because a judgment's execution is delayed it must be devalued. It does not follow that because a mortgage agreement by its terms my not be subject to foreclosure the accrual of interest stops.

Finally, Lloyd's makes a disingenuous statement verging on misrepresentation that there is no conflict between *Enserch Corp. v. Shand Morahand & Co.*, 918 F.2d 462 (5th Cir. 1990) and *Bronson* by attempting to create the illusion of an inconsistency between our judgment and that in *Bronson*. *Bronson* clearly involved a conflict between the nature of the initial judgment and the potential judgment after appeal. This case is clearly different since our initial judgment amount is not impacted by the appeal. Alcan would simply be entitled to more money and in all other respects the amount already owed remains the same whether Alcan won the appeal or not. Moreover, as Alcan clearly demonstrated in its initial submission, Lloyd's never argued it was entitled to a stay because of any inconsistency between the first judgment and the appeal. Instead, it simply did not want to be put to the inconvenience of collecting from its syndicates twice. (Petition at 11)

All that Lloyd's can offer for its alleged inconsistency is that the appeal requests that the district court's opinion "should be reversed". Or, put another way, the nature of an appeal is a request that the district court should be reversed. Thus, under Lloyds distorted reasoning every appeal results in an inconsistency between the initial judgment and the requested appellate relief.

Rather than offering support for its position that this Court should disregard review of this case, Lloyd's Response illustrates the low level to which the legal process has fallen in this country due in no insubstantial measure by this Court's failure to insist on responsible accountable conduct by the inferior court's which now believe they can do or say what they will without consequence and accountability– a practice which is now being emulated by the bar.

II. LLOYDS' ARGUMENT THAT RULE 39(E) PERMITS THE DISTRICT COURT TO TAX THE COST OF THEIR BOND TO ALCAN SIMPLY DEMONSTRATES THAT EVEN LLOYD'S DOES NOT BELIEVE THAT THE DISTRICT COURT AND THE NINTH CIRCUIT OFFERED PLAUSIBLE JUSTIFICATION FOR WHAT THE DISTRICT COURT AND THE NINTH CIRCUIT DID

The Clerk of the District Court rejected Lloyd's argument that Rule 39(e) applied noting that it did not prevail with respect to the amount subject to the bond. That amount was still owed. If Lloyd's had thought the bond was not required, it should have appealed that issue. It did not.

Lloyd's then took its argument to the district court which granted Lloyd's request placing the costs of the bond on Alcan. However, the district court did not rely on Rule 39(e) since that rule was clearly irrelevant.

The matter was submitted to the Ninth Circuit on Alcan's appeal where Lloyd's again tried to resurrect Rule 39(e). Even the Ninth Circuit did not apply that rule because claiming it was relevant was ludicrous, and the court instead created the bizarre explanation that the action of the district court was like granting legal fees (albeit after an appeal had theoretically finally resolved all the issues in dispute) citing *LSO Ltd., v. Strohs,* 205 F.3d 1146 (9th Cir. 2000).

III. LLOYDS' ATTEMPT TO CHARACTERIZE THE ISSUE OF THE EFFECTIVE DATE OF JUDGMENT AS SIMPLY A MATTER OF IMPROPERLY CALCULATING THE INTEREST FROM THE CORRECT DATE IS A PATENT MISREPRESENTATION OF THE FACTS. AS IT ADMITS THE JUDGMENT WAS AMENDED FOR THE

CONVENIENCE OF ANOTHER INSURER TO CLARIFY A MATTER SOLELY WITH RESPECT TO IT, NEITHER THE RIGHTS OF LLOYD'S OR ALCAN WERE MODIFIED BY THE CHANGE AND EACH OF THE OTHER INSURERS PAID INTEREST CALCULATED FROM THE ORIGINAL DATE. THE REAL ISSUE IS WHETHER COURTS CAN MODIFY LEGAL OBLIGATIONS FOR THEIR FORMER CLIENTS WHO HAVE CHOSEN NOT TO APPEAL THE ISSUE.

Lloyd's argument with respect to the date of judgment and post judgment interest is simply another variation of the non-transparent federal legal system which is becoming the dominant mode of conduct in this Country because this Court appears to be indifferent. Clearly, this was a case where lawyers for Alcan were trying to exercise civility and professional courtesy to its opposing counsel by not giving a colleague a hard time in amending a clerical error in a judgment. Lloyd's was part of this effort and it was understood that fundamental legal rights were not going to be compromised.

However, after appeal Lloyds with their former lawyer who is now the district judge jumped on this courtesy to further enhance Lloyd's position. If this was a matter of legitimate concern it should have been raised in appeal and resolved by a published precedential opinion. If Alcan's courtesy was at its peril and courts were not going to honor and encourage professional conduct, they should say it publicly so others are forewarned. By allowing the conduct of the court in punishing courtesy to remain hidden and then taking to the public platform to lament the sorry state of professional ethics, this Court is engaging in the worse form of hypocrisy.

IV. LLOYDS' ATTEMPT TO CHARACTERIZE THE NINTH CIRCUIT'S DECISION CONCERNING THE DAY AFTER THANKSGIVING AS A TRIVIAL FACTUAL DISPUTE IS DISINGENUOUS BECAUSE IT IGNORES THE FACT THAT THE ISSUE WOULD HAVE WIDESPREAD IMPORTANCE IN CALIFORNIA AND PERHAPS OTHER STATES WHERE THE DAY HAS ALL THE PRACTICAL ATTRIBUTES OF A STATE HOLIDAY.

Lloyd's ignores the fact that the Ninth Circuit's decision that the Friday after Thanksgiving is not really a State holiday is clearly an attempt by the Ninth Circuit to construct a rule of law only applicable to Alcan. It ignores this fact because it cannot explain why this ruling would not be of significant importance to numerous people. Alcan's attempt to file on Friday by use of an Express Courier service is typical. The fact that it was unsuccessful demonstrates that the "legally accessible courthouse" may not be practically accessible by conventional means. The bar deserves to know about this curious set of circumstances. The fact that Friday which had all the attributes of a State Holiday, but was really only a state declared "administrative" holiday which had legal significance to the Ninth Circuit, but no practical significance apparently to anyone else, is also something worthy of widespread dissemination.

Clearly, the reasoning behind this rather remarkable conclusion on the nature of the Friday holiday was not something that should not be published and precedential because exhaustive research was required. It was not published and made precedential because if it was published the Ninth Circuit had no intention of ever applying it anyone but Alcan.

Finally, Lloyds clearly mischaracterizes the determination that the Friday after Thanksgiving was not State Holiday as a "factual" finding and therefore did not merit this Court's attention. This assertion is simply wrong. There are no disputes

as to what the Governor did or whether the State Offices were closed. The issue is exclusively the legal significance of those facts—a legal issue.

V. LLOYDS' OPPOSITION DOES NOTHING TO DISPUTE THE FACT THAT THE ENTIRE COURSE OF CONDUCT BY THE COURTS EVIDENCES A SYSTEMATIC EFFORT TO FRUSTRATE THE APPLICATION OF THE RULE OF LAW.

Whether or not one might be able offer a plausible explanation for one of the issues raised by Alcan, it is clear that the combination of behavior by the courts including the clearly recorded conduct by the district court relying explicitly on his personal experiences as a lawyer for Lloyd's in contriving a result clearly not authorized by the Federal Rules (the right to a stay for the administrative convenience of a non-appealing party)[1] is clearly beyond legitimate explanation. Tragically, this type of judicial conduct is becoming commonplace and this Court's failure to address it is viewed as a license to act without accountability.

Lloyds' Opposition asks this Court to place its stamp of approval on its use of a hyper-technical rationale to take advantage of professional courtesy by ignoring its abuse. It further asks this Court to undercut the finality of the appellate process by allowing non-appealed rights to be modified after appeal by a compromised lower Court. In short, it invites this Court to become part of the problem not part of the solution.

Dated: June 6, 2002

---

[1] The district court had concurred with the 5th Circuit that *Bronson* was no longer viable after the adoption of the Federal Rules of Civil Procedure, which did not incorporate the *Bronson* rational.

Respectfully submitted,

Lawrence A. Salibra, II
Elisa P. Pizzino
Alcan Aluminum Corporation
6060 Parkland Blvd
Mayfield Heights OH 44124-4185
440-423-6918

Attorneys for petitioner
Alcan Aluminum Corporation